

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS: 01-0145
Gross Retail Tax
For the 1998 and 1999 Tax Years**

NOTICE: Under IC 4-23-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Imposition of Sales Tax on the Sale of School Photographs.

Authority: IC 6-2.5-2-1; IC 6-2.5-4-1(b); IC 6-2.5-8-8; 45 IAC 2.2-2-2; 45 IAC 2.2-3-3; 45 IAC 2.2-3-3(2); 45 IAC 2.2-5-25; 45 IAC 2.2-5-25(a); 45 IAC 2.2-8-12(b).

Taxpayer is of the opinion that it should not be responsible for collecting sales tax on its sales of school photographs.

II. Prospective Treatment of Sales Tax Liability.

Authority: City Securities Corp. v. Dept. of State Revenue, 704 N.E.2d 1122 (Ind. Tax Ct. 1998); IC 6-8.1-3-3.

Taxpayer argues that if it is determined that it is responsible for collecting sales tax on its sales of school photographs, that determination should be given only prospective effect.

STATEMENT OF FACTS

Taxpayer takes and sells photographs. At issue in this protest, is the taxpayer's sale of "panoramic" (group) school photographs. Audit determined that the taxpayer should have been collecting sales tax on each sale of a photograph and assessed taxpayer for the uncollected taxes. Taxpayer maintains that it selling the photographs to schools and, because taxpayer holds exemption certificates from these schools, it was not responsible for the collection of the sales tax.

After taking a photograph of a group of students, taxpayer provides the school with envelopes to be sent home with the students. In most instances, the envelope states the price of each photograph. In some instances, the envelope omits the price of the photograph thereby permitting the school to determine the cost of the photograph.

The students are instructed that, if they wish to purchase a photograph, they should return the envelope to the school and include the payment with the envelope. After accumulating the returned envelopes, the school forwards the orders to taxpayer. In some instances the school will retain any cash payments and write a single check to taxpayer in lieu of the retained cash. In most instances, the school will give the taxpayer the accumulated student checks.

The schools earn money from taxpayer's sale of the photographs. For those sales in which taxpayer establishes the price of the photographs, the school receives a percentage of the total sales. For those sales in which the school establishes the price of the photographs, the school receives a flat fee – established by the school itself – for each photograph.

What is not at issue are those sales in which the school directly purchases a number of photographs the number of which is not determined by student orders. In these particular instances, the school “gives” the photograph to each member of a student group (for example, members of the senior class). Alternatively, the school simply resells the photographs to its students. In either case, the school bears the risk of loss for any unused or unsold photographs. Also not at issue, are those instances in which the taxpayer sells a photograph to the school for use in the school's student annual.

What is at issue are those sales which, on the surface, the school is acting as a disinterested agent for the taxpayer in taking orders from, and then distributing the photographs to, individual members of the student body. Taxpayer predicates its claim based upon the receipt of exemption certificates from the various schools.

DISCUSSION

I. Imposition of Sales Tax on the Sale of School Photographs.

Under IC 6-2.5-2-1, Indiana imposes a gross retail (sales) tax on retail transactions made within the state. A retail transaction, the pre-requisite to the imposition of the sales tax, is defined as the transfer, in the ordinary course of business, of tangible personal property for consideration. IC 6-2.5-4-1(b).

45 IAC 2.2-2-2 imposes on “retail merchants” the responsibility for collecting sales tax. The regulation states in relevant part that a “retail merchant, acting as an agent for the state of Indiana, must collect the tax.”

45 IAC 2.2-3-3 defines “retail merchants” responsible for collecting sales tax. The regulation states that “retail merchants” includes:

Any retail merchant engaged in selling at retail for use, storage, or consumption in Indiana and having any representative, agent, salesman, canvasser, or solicitor operating in Indiana under the authority of the retail merchant or its subsidiary for the purpose of

selling, delivering, or taking orders for the sale of any tangible personal property for use, storage, or consumption in Indiana. 45 IAC 2.2-3-3(2).

Under the relevant statutory and regulatory authority, taxpayer is a retail merchant engaged in the process of selling tangible personal property to students. In effect, the various schools are acting as the taxpayer's agent in what is essentially a "pass-through" transaction between taxpayer and its student customers. This conclusion is justified by the simple realities of the transactions at issue. Taxpayer is soliciting students to purchase the photographs; taxpayer is not soliciting schools to purchase these photographs. The success or failure of taxpayer's decision to invest the time and effort to take the original photograph is entirely dependent upon the students' discretionary decision to purchase the photographs. When taxpayer sends out an envelope soliciting photograph orders, it is directing that solicitation at the students and not at the schools. The schools bear no risk of loss for the purchase of the photographs; there is no possibility that the schools will be left holding unsold and unwanted photographs. If the student is dissatisfied with the finished photograph, the students are required to deal with the taxpayer and not with the school because, in reality, it was the taxpayer who sold the photographs to the students and not the schools.

Accordingly, the taxpayer is acting as a "retail merchant" in authorizing the various schools to act as taxpayer's agents for the purpose of taking orders for the sale of tangible personal property, and is responsible to the state for collecting the sales tax.

Taxpayer argues that it is entitled to rely upon the exemption certificate it collected from the various schools. Taxpayer solicited the exemption certificates – in certain cases after the photograph sales had occurred – by letter stating that taxpayer was updating its files and requesting the exemption certificate from each school.

45 IAC 2.2-5-25 permits schools to make certain purchases without paying the sales tax. The regulation states that "only the purchase of tangible personal property used by the governmental agency in connection with a governmental function may be purchased exempt from sales tax." 45 IAC 2.2-5-25(a).

IC 6-2.5-8-8 allows exempt organizations to issue a certificate when the organization is exempt from paying sales tax on a particular purchase. In relevant part, IC 6-2.5-8-8 states that an authorized organization "[which] makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax." Under 45 IAC 2.2-8-12(b), "Retail merchants are required to collect the sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used by the purchaser for an exempt purchase."

Taxpayer is correct in its initial assertion. A retail merchant is entitled to rely upon the customers' exemption certificate when the customers are making exempt purchases. However, taxpayer's argument fails when – upon closer examination of the facts regarding the purchases here at issue – it is plainly not the exempt schools which are purchasing the photographs. Having solicited sales from, and accepted payment from individual students, taxpayer may not ignore the

simple realities of the transactions and rely upon an exemption certificates issued by its disinterested sales agents.

FINDING

Taxpayer's protest is respectfully denied.

II. Prospective Treatment of Sales Tax Liability.

Taxpayer sets out a general equitable argument – unsupported by citations to statutory or regulatory authority – that the Department, having found that the sale of school photographs is subject to the sales tax, should impose that tax liability on a prospective basis only.

Under IC 6-8.1-3-3, the Department is without authority to reinterpret a taxpayer's tax liability without promulgating and publishing a regulation giving taxpayer notice of that reinterpretation. IC 6-8.1-3-3(b) states that “[n]o change in the department's interpretation of a listed tax may take effect before the date the change is: (1) adopted in a rule under this section; or (2) published in the Indiana Register”

In City Securities Corp. v. Dept. of State Revenue, 704 N.E.2d 1122 (Ind. Tax Ct. 1998), plaintiff taxpayer argued that the Department could not impose gross income tax on the gain realized from the sale of tax exempt bonds, because that gain had been treated as exempt for 42 years. Id. at 1128. Plaintiff taxpayer argued that, in the absence of a new rule or regulation, the Department's assessment of gross income taxes against the gain realized from the sale of bonds was invalid. Id. at 1129. The Tax Court found that, despite the intervening adoption of regulations to the contrary, the Department could not impose the additional taxes when the Department had permitted plaintiff taxpayer to claim an exemption from the taxes subsequent to the adoption of the intervening regulations. Id.

Taxpayer argues that it was entitled to rely upon a prior audit, covering the years 1990 through 1992, in which taxpayer's sales of photographs were apparently not assessed sales tax even though that earlier audit did assess sales tax on those particular sales for which taxpayer failed to provide auditor with a valid exemption certificate. Based upon the scanty information contained within the earlier audit, it is possible to arrive at a conclusion that sales transactions – similar to those transactions here at issue – undertaken during the 1990 through 1992 tax years, were not assessed sales tax. However, there is no indication that the earlier audit ever considered in any detail whatsoever, the nature of the sales made to the schools. There is no indication that the sales conducted some ten years ago were in any way similar to the manner in which taxpayer currently solicits the purchase of school photographs or collects the payment from those sales. There is no indication that the Department arrived at a “determination” or “interpretation” that taxpayer's sales of student photographs were not subject to imposition of sales tax.

Unlike the plaintiff taxpayer in City Securities, taxpayer is unable to point to a prior court case, letter of findings, or Department advisory letter indicating that the sale of school photographs

was exempt from sales tax. City Securities at 1129. Rather, the statutory and regulatory authority supporting imposition of the gross retail tax on the sale of school photographs was fully in place at the time of taxpayer's earlier audit. Absent any indication that the Department has changed its interpretation of the gross retail tax since taxpayer's previous audit, IC 6-8.1-3-3 does not require the Department to give affect to taxpayer's sales tax liabilities on a prospective basis. Absent any requirement to do otherwise, the Department has no independent authority whatsoever to grant taxpayer's equitable request for prospective treatment of its sales tax liabilities.

FINDING

Taxpayer's protest is respectfully denied.